Office-Supreme Court, U.S.
FILED
JAN 19 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1018

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

EDEN H. POND,
ENDA H. BOBE,
CONSOLIDATION COAL COMPANY,
Appellants,

v.

ULYSSES G. WALDEN, JR.
CAROLYN SALLEE WALDEN,
Appellees,

LOUISE F. SHORT,
Intervenor.

MOTION TO DISMISS OR IN THE ALTERNATIVE TO AFFIRM

CHARLES R. NIXON
223 W. State St.
Princeton, Indiana 47670
Telephone (812) 385-5233
Counsel for Appellees

VERN P. PARTENHEIMER, JR.
Hall, Partenheimer & Kinkle
219 North Hart St.
P.O. Box 313
Princeton, Indiana 46760
Telephone (812) 385-2586

RONALD W. POLSTON
735 W. New York St.
Indianapolis, Indiana 46202
Telephone (317) 264-4993
Counsel for Intervenor

Central Publishing Company, Inc., Indianapolis, IN 46206

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Motion to Affirm	1
Reasons for Affirmance	2
Conclusion	8

TABLE OF AUTHORITIES

Cases	Page
Bell v. Burson (1971) 402 U.S. 535, 91 S.Ct. 1586 ...	7
Chicago & N.W. Trans Co. v. Pederson, 80 Wis. 2d 566, 259 N.W.2d 316 ...	3, 6
City of Miami v. St. Joe Paper Co. (Fla. 1977), 347, So.2d 622 ...	4
Contos v. Herbst, (Minn. 1979), 278 N.W.2d 732 ...	3
Frost Johnson LBR Co. v. Sallings Heirs, (1920) 150 LA 756, 91 So. 207 ...	5
Gerhard v. Stephens (1968) 68 Cal. 2d 864, 69 Cal. RPTR 612, 442 P.2d 692 ...	6
Hiddleston v. Neb. Jewish Ed. Soc. (1911) 186 Neb. 786, 186 N.W.2d 904 ...	4
Jackson v. Lampshire, (1830) 28 U.S. 280 ...	3
Love v. Lynchburg Nat. Bank, (1965) 205 VA 860, 140 S.E.2d 650 ...	5
Mire v. Hawkins (La. 1965) 177 So.2d 795, 800 ...	6
Mullane v. Central Hanover Trust Co. (1950) 339 U.S. 306, 94 L.Ed. 865, 70 S.Ct. 652 ...	7
Nelson v. Bloodworth (1977) 238 GA. 263, 232 S.E.2d 547 ...	5
Trustee of Schools v. Batdorf, (1955) 6 ILL. 2d 486, 130 N.E.2d 111 ...	4
Trustees of Tufts Coll. v. Triple R. Ranch, Inc. (Fla. 1973) 275 So. 2d 521 ...	5
Van Slooten v. Larsen, (Mich. Sup. Ct. Docket #62256, decided 12-23-80) ...	5
Wheelock v. Heath, (1978) 201 Neb. 835, 272 N.W.2d 768 ...	3
Wilson v. Bishop, (ILL. 1971) 412 N.E.2d 522 ...	3

TABLE OF AUTHORITIES—Continued

Statutes	Page
ILL. Rev. Stat. Ch. 30, §§37e et seq.	3
Ind. Code 32-1-5-1	4
VA. Code §§55-154 and 55-155	5
Mich. Comp. Laws 554.291	5
Ga. Code §85-407.1	5
Art. 789 and 3546, West LA Civ. Code Anno. (1953); (now Wests LSA Rev. Stat. §31:74 and Wests LSA Civ. Code Art. 753)	5
Articles and Texts	
Lerner, *The Mind and Faith of Justice Homes*, 417 (1953)	3
Polston, *Legislation Existing and Proposed Concerning Marketability of Mineral Titles*, VII Land and Water L.R. (1972)	2
Street, *Need for Legislation to Eliminate Dormant Mineral Interests*, 42 Mich. St. M.J. 49 (March, 1963)	2
Uniform Acts, Land Transactions, Simplifications of Land Transfers, Condominiums, 223 West. Pub. Co. 1978	4

No. 80-1018

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

EDEN H. POND,
EDNA H. BOBE,
CONSOLIDATION COAL COMPANY,
Appellants,

v.

ULYSSES G. WALDEN, JR.
CAROLYN SALLEE WALDEN,
Appellees,

LOUISE F. SHORT,
Intervenor.

MOTION TO DISMISS OR IN THE ALTERNATIVE TO AFFIRM

Now comes the appellees, Ulysses G. Walden, Jr. and Carolyn Sallee Walden, and the intervenor Louise F. Short, and moves this court to dismiss or in the alternative to

affirm the decision of the Indiana Supreme Court on the ground that there is no substantial federal question.

REASONS FOR AFFIRMANCE

There is no substantial federal question involved in this case. The statute here held constitutional is a marketable title statute and it operates in a manner similar to other kinds of marketable title statutes which have been upheld from almost the beginning of our legal system.

It provides for the termination of interests which have been split off from the residuary interest in land. Termination occurs because the owner of the interest has failed to manifest a desire to maintain his interest for a long period of time. When termination occurs the interest is reunited with the residual interest in the land.

These kinds of statutes reflect several basic policy objectives. Their primary purpose is to prevent interests in land from being held for long periods of time by people who aren't deriving any benefit from such ownership. Such persons tend to get out of hand and unlocatable. When title questions are raised, or the property becomes valuable, it is difficult to develop or trasfer the land because the owner of such interest can't be found. Statutes such as this are needed to keep land titles marketable. See Street, *Need for Legislation to Eliminate Dormant Mineral Interests*, 42 Mich St., B.J. 49 (March 1963); Polston, *Legislation Existing and Proposed Concerning Marketability of Mineral Titles*, VII Land and Water L.R. (1972).

A second policy objective no doubt also involves the expectations which are developed by those who live upon and utilize the land without disturbance by those whose rights depend upon a fragmentation of the title which occurred years earlier. This was eloquently expressed by Mr. Justice Holmes in defending the operation of statutes of limitations. He said:

> Man, like a tree in the cleft of a rock, gradually shapes his roots to his surroundings and when the roots have

> grown to a certain size, cannot be displaced without cutting at his life. (Lerner, *The Mind and Faith of Justice Holmes*, 417 (1953))

There are many kinds of statutes which have served these same policy objectives and they have been upheld almost without exception. Statutes of limitations are a prime example. When an owner of land fails to assert his rights against a trespasser for a prescribed period the result is a transfer of title to the trespasser. The owner of land has lost his interest because he has failed to act in a timely manner to preserve it. There is no requirement of a hearing with notice and right to be heard prior to the loss of rights. The statute is self executing. Procedural due process does not become a question until and unless a dispute arises as to the existence of the facts which brought the statute into operation. Nor was there any requirement, as is suggested by the appellant and by the cases cited by appellant from Illinois, Wisconsin, Minnesota and Nebraska, *(Wilson v. Bishop*, (1980 ILL.) 412 N.E.2d 522; *Chicago and N.W. Trans. Co. v. Pederson*, 80 Wis. 2d 566, 259 N.W. 2d 316; *Contos v. Herbst* (Minn. 1979), 278 N.W.2d 732, *Wheelock v. Heath* (1978) 201 Neb. 835, 272 N.W.2d 768), that the legislatures which initially enacted statutes of limitations serve personal notice upon every landowner in the state in order for the statute to be operative with respect to his/her land. See *Jackson v. Lamphire*, (1830) 28 U.S. 280.

Recording acts also represent an effort to keep titles marketable and they also operate in a manner similar to the statute involved in this case. A title is terminated because of a failure to record ones' title document, and once again the statute is self executing. When the facts specified in the act occur the title is lost. *Jackson v. Lamphire* (1830) 28 U.S. 280.

Many states have also adopted statutes which terminate certain kinds of future interests. A typical statute is the Illinois Reverter act. 30 ILL. Rev. Stat. 37e et. seq. It provides that possibilities of Reverter can only last for a

period of fifty years and are then terminated. The act is applicable to existing interests which were created more than 50 years before its passage. It was held to be valid. No notice and hearing were provided nor did anyone contend they were necessary. *Trustee of Schools v. Batdorf* (1955) 6 ILL. 2d 486, 130 N.E.2d 111. See also *Hiddleston v. Neb. Jewish Ed. So.* (1911) 186 Neb. 786, 186 N.W.2d 904.

The various marketable title statutes are more clearly analogous to the statute involved here. In fact they operate on mineral interest in the same manner and for much the same reason. The marketable title acts terminate interests which are inconsistent with a root of title which has been of record for a specified period. (See e.g., Ind. Code 32-1-5-1 et. seq., which provides for a 50 year period). They terminate interests which have been fragmented off from the fee, including mineral interests, if there is a conveyance of the fee which does not except them, which has been of record for a prescribed period, unless the fragment has been the subject of a conveyance recorded within that period of time. *Uniform Acts, Land Transactions, Simplification of Land Transfers, Condominiums*, 223 West Pub. Co. 1978. Thus, if the minerals were severed from the surface in 1910 and the surface was transferred in 1915 in a conveyance which simply described the land, and made no mention of the minerals, the presence on the record of the 1915 conveyance for the prescribed period would terminate the mineral interest unless the mineral interest was, itself the subject of a recorded conveyance within that period. The mineral interest is terminated when the facts specified in the act coexist and the act makes no provision for notice and hearing. The Model Marketable Title act has been adopted in a great many states and it has been upheld whenever challenged. See e.q., *City of Miami v. St. Joe Paper Co.* (Fla. 1977), 347, So.2d 622.

Statutes similar to the one involved in this case have also been upheld against constitutional attack. Statutes in Virginia (Va. code §§55-154 and 55-155), Michigan (Mich.

Comp. Laws 554.291 et seq.) and Georgia (Ga. code §85-407.1) which have the same objectives as the act in the instant case have been upheld. *Love v. Lynchburg Nat. Bank* (1965) 205 VA 860, 140 S.E.2d 650; *Nelson v. Bloodworth* (Ga. 1977) 232 S.E.2d 547; *Van Slooten v. Larsen* (Mich. Sup. Ct. Docket #62256, decided Dec. 23, 1980). A statute in Florida which was very similar to the one in the instant case, except that it did not provide for a grace period for interests as to which the period had expired prior to the effective date of the act, was struck down because of the absence of the grace period but the Florida court expressed the opinion that it would have otherwise passed constitutional muster. *Trustees of Tufts Coll. v. Triple R Ranch, Inc.* (Fla. 1977) 275 So.2d 521.

In Louisiana a provision of the civil code which long predated the existence of a mineral industry in that state was held applicable to mineral interests. See Art 789 and 3546 West LA. Civ. Code Anno. (1953), (now Wests LSA Rev. Stat. §31:74 and Wests LSA Civ. Code Art. 753). That codal provision related to easements and it was held applicable because Louisiana characterized mineral interests as incorporeal interests. *Frost Johnson LBR Co. v. Sallings Heirs* (1920) 150 LA 756, 91 So. 207. (In fact so do many other states including Indiana). The codal provisions, which apply a doctrine known as liberative prescription operate to terminate any mineral interest which is non productive for a period of ten years. There is no provision for extending an interest by filing a document as is true in Indiana. The theory seems to be that the servient (surface) owners use of the surface is adverse to that of the dominant (mineral) owner, and that use continued for ten years matures a right in the servient owners to be free of the burden imposed by the mineral interest. The estate is freed of the incorporeal interest. Judging from the decided appelate cases applying the doctine (which run into the hundreds) most mineral interests in Louisiana must be dependent upon the operation of the doctrine. Again it, and the amendments to it, are applied retroactively; see *Mire v. Hawkins* (La. 1965) 177 So.2d 795. It operates when the

requisite faces coexist; and there is no notice or hearing provision.

In California the Supreme Court adopted a rule very similar to the Indiana statute by judicial decision and it did so for the purpose of effecting the very same policy objectives. *Gerhard v. Stephens* (1968) 68 Ca. 2d 864, 69 Cal. RPTR 612, 442 P.2d 692, 714. The court there held that mineral interests could be found to be abandoned in favor of the surface owner if unused for a long period of time.

The statute in the instant case thus operates no differently than countless other statutes which have similar objectives. It proceeds upon a principle that is fundamental to our system. That principle is the self executing statute. Rights can be created, transferred or terminated because the facts specified in the law coexist. Most laws in our system operate on the basis of this principle. A great deal of the property in the United States is held by virtue of the operation of marketable title statutes which utilize that principle. It is here asserted, however, that because the Indiana Supreme Court has applied that principle in upholding a statute enacted by the States' Legislatures, this court ought to take jurisdiction and decide whether that statute violates the U.S. Constitution. The principle basis for the assertion is that State Supreme Courts in Illinois, Wisconsin, Minnesota and Nebraska have struck down similar statutes. It is not disputed that those courts have advanced the proposition which appellants are asserting here. They have held that statutes similar to the one involved here are invalid because of a denial of procedural due process. The Wisconsin court in *Chicago & N.W. Trans. Co., Pederson*, 80 Wis.2d 259 N.W.2d 316 said, for example:

> "In this case, the plaintiffs mineral rights will revert to the surface owner if they are not registered or taxes paid on them. At least the plaintiffs must have a hearing where they can question the determination of the register of deeds that the registration has not been done or that the taxes have not been paid."

The Wisconsin court, and those following its lead, are clearly saying that a law cannot operate to create transfer, or terminate a right unless it makes provisions for an administrative type hearing in which the facts are found, upon the basis of which the statute is to operate. Such a proposition is, once again inconsistent with the manner in which our legal system has operated since its beginning. Most of our laws operate when the requisite facts come to coexist. If an individual desires to dispute the application of the law to him/her, he/she can have the facts determined by a court of law. It is only then that procedural due process becomes a factor. If the proposition advanced by appellants and the Illinois, Wisconsin, Minnesota, and Nebraska courts, is sustained by this court it will mean that most of the laws by which property are held in the country, certainly all of the judge made laws, are invalid. Indeed it will then mean that judges can no longer make laws unless they are given the power to set up administrative agencies to enforce them. Such a proposition is ridiculous and should not be the basis for this court's assuming jurisdiction.

There is certainly nothing in the decisions of this court which supports the proposition here advanced. Most frequently cited in support of the proposition are cases such as *Bell v. Burson* (1971) 402 U.S. 535, 91 S.Ct. 1586, and *Mullane v. Central Hanover Trust Co.* (1950) 339 U.S. 306, 94 L. Ed. 865, 70 S.Ct. 652. In the Bell case the adversaries were the government and a citizen and the right being denied was one enjoyed by all persons similarly situated. In the Mullane case a final adjudication was being made without adequate notice. It is submitted that neither of these cases nor any cited by appellants establish a proposition so for reaching or unsettling as that advanced by appellants.

CONCLUSION

It is respectfully submitted that this appeal present no substantial federal question and should be dismissed or in the alternative affirmed.

Respectfully submitted,

CHARLES R. NIXON
223 W. State St.
Princeton, Indiana 47670
Telephone (812) 385-5233
Counsel for Appellees

VERN P. PARTENHEIMER, JR.
Hall, Partenheimer & Kinkle
219 North Hart St.
P.O. Box 313
Princeton, Indiana 46760
Telephone (812) 385-2586

RONALD W. POLSTON
735 W. New York St.
Indianapolis, Indiana 46202
Telephone (317) 264-4993
Counsel for Intervenor